Petition

81-375

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1981

DOWELL DIVISION OF THE DOW CHEMICAL COMPANY,

Petitioner,

vs.

FRANCONIA SEA TRANSPORT, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

(1) Is the fiction of "the personality of the vessel" a viable concept of law so as to separate the "obligation of the vessel" from the obligation of the vessel's owner to discharge a maritime lien to the extent of his interest in the vessel?

(2) Where the court obtained jurisdiction over the person of the owner of a vessel, may a supplier of necessaries upon order of the charterer, for which the supplier acquired a maritime lien on the vessel (46 U.S.C. §§971, et seq.), assert the lien in an action in personam against the owner to the extent of the latter's interest in the vessel?

(3) Is the arrest of the vessel a substantive conditio sine qua non for the assertion of a maritime lien against the owner of the vessel?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Dowell Division of the Dow Chemical Company ("Dowell") prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit dated May

15, 1981, which affirmed a judgment of dismissal of the United States District Court for the Southern District of New York upon the opinion of the District Judge.

OPINIONS BELOW

The Circuit Court of Appeals rendered no opinion (1a.-2a)*, the opinion of the District Court seems to be unreported, and is set forth in the appendix (3a.-20a). It partly adopted a report and recommendation of a United States Magistrate to whom the District Judge had referred motions for summary judgment of the parties to the action (21a.-45a).

JURISDICTION

The jurisdiction of the Court to allow the Writ of Certiorari is based on 28 U.S.C. §1254(1), the petition being from a final judgment of the United States

*References are to the pages of the appendix to this petition.

Court of Appeals for the Second Circuit made on May 15, 1981, affirming a judgment of the United States District Court for the Southern District of New York upon the opinion of district court below.

No application for a rehearing was made in the Circuit Court of Appeals.

FEDERAL STATUTES INVOLVED

46 U.S.C. §971:

"Persons entitled to lien.

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

46 U.S.C. §972:

"Persons authorized to procure repairs, supplies, and necessaries.

The following persons shall be presumed to have authority from the owner to procure repairs,

> supplies, towage, use of dry dock or marine railway and other necessaries for the vessel: The managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

STATEMENT OF THE CASE

The petitioner, as plaintiff, commenced an action in the United States District Court for the Southern District of New York against the respondent, the owner of the M/V George Vergottis, for loading services to the vessel in the sum of $310,415.60 by pumping of oil in July and August, 1976, in the nature of stevedoring services, while the vessel was in Brownsville, Texas, under a charter from the respondent to one Trefalcon Sales Corporation. The complaint alleged that the charterer ordered the pumping services and failed to pay therefor. The

action was commenced, without a prior seizure of the vessel, in an *in personam* action against respondent, the vessel's owner, seeking payment from the defendant in the action, for the discharge of the maritime lien which the respondent had acquired pursuant to 46 U.S.C. §971 *et seq*. The respondent, as defendant in the action, interposed seven affirmative defenses, only the defenses on jurisdiction were reached by the trial court and resolved in favor of the plaintiff, but the court dismissed the complaint as a matter of law, holding that the allegations of the complaint "would only establish a maritime lien, not liability of the owner *in personam*," (8a.) but in an amended opinion the District Judge seemed to base the dismissal on procedural grounds, saying "if any lien was obtained, it may not be enforced in this action." (19a)

Seemingly, the procedural ground for the dismissal of the complaint was the failure to "arrest the vessel".

Jurisdiction in the District Court was based on 28 U.S.C. §1332 (diversity of citizenship).

The petitioner herein took an appeal from the judgment of dismissal of the District Court for the Southern District of New York to the United States District Court of Appeals, Second Circuit. The appeal was heard on May 14, 1981 and the Circuit Court rendered its judgment the following day (May 15, 1981), affirming the judgment of the District Court "on Judge Sofaer's opinion below." (1a.-2a)

ARGUMENT FOR ALLOWANCE OF THE WRIT

The question of law presented on this petition is for a clarification of the nature of a maritime lien developed

through centuries in admiralty courts of several countries, and as currently applied in the federal judiciary of the United States, namely, whether a maritime lien is "a liability of the vessel" alone, or whether the owner of the vessel has an obligation to discharge the maritime lien to the extent of his interest in the vessel even without the prior "arrest of the vessel". The petition thus poses an important question of federal admiralty law upon which there is no clear statement from this Court. We respectfully submit that a pronouncement by this Court on the obligation of the owner of a vessel in connection with a maritime lien (apart from a common law liability in contract or tort) is called for to settle a much discussed and still open question of law.

Since the Circuit Court of Appeals, Second Circuit, affirmed the judgment of

the District Court upon "Judge Sofaer's opinion below", our argument must thus direct itself to the opinion and holding of Judge Sofaer in the District Court, which, we believe, has failed to perceive the distinction between the procedural remedy of the "arrest of the vessel" and the substantive obligation of its owner to discharge the maritime lien. Judge Sofaer speaks of "in rem liability" but has not answered the question whose liability it is. Implied in his holding is the fiction of the "personality of the vessel" as a legal entity separate and apart from that of its owner. We respectfully submit that this fiction is unsound on jurisprudential grounds, and should finally be rejected by this Court.

In its complaint, the plaintiff, petitioner herein, asserted a claim for "necessaries" supplied to the respon-

dent's vessel M/V George Vergottis in loading of a cargo of oil for which the petitioner claimed to have acquired a maritime lien. The action was commenced by the filing of a summons and complaint in the United States District Court for the Southern District of New York, and service thereof on defendant's agent, without the prior "arrest of the vessel." Admittedly, the loading services were rendered not upon the order of the owner of the vessel, but upon the order of the charterer, allegedly "with the consent of the vessel's crew." It is the contention of the petitioner, as the plaintiff in the action, that the owner of the vessel is obligated to discharge the maritime lien acquired thereon by a supplier of "necessaries" to the extent of his interest in the vessel, even without the prior arrest of the vessel by admiralty

process.

Implied in the District Court's decision is a holding that personal jurisdiction over the defendant in the action had been obtained and that the court had jurisdiction over the subject matter of plaintiff's claim.

The judgment of the District Court was in the nature of a dismissal on the pleadings for legal insufficiency, and taking the allegations of the complaint as true, the crux of the District Court's decision was that "this would only establish a maritime lien, not liability of the owner in personam"(8a.). The District Court supported this holding by saying "maritime law has long established that the maritime lien may impose in rem liability in situations where the owner is not personally liable." (9a.)

What is "in rem" liability? The District Court did not explain the concept. We submit if there is such a thing as "in rem liability" it must be understood as expressing a liability restricted to the value of the vessel.

But whose liability is it? The vessel's? Can the vessel be separated from its owner?

It is unquestioned that in English admiralty practice a maritime lien imposes a coextensive personal liability of the owner of the vessel, one can not exist without the other. This seemed also to have been the accepted concept in this country, at least until the decision in The China, 74 U.S. (7 Wall) 53; 19 L.Ed. 67 (1868).

In The Belfast, 7 Wallace 624; 19 L.Ed. 266 (1868), this Court said:

"Wherever a maritime lien arises, the injured party may pursue his remedy whether for a breach of a maritime contract or for a marine tort, by a suit in rem, or by a suit in personam at his election. Attention will be called to three classes of cases only as examples to illustrate that proposition; but many more might be given to the same effect.

* * *

Material-men also, who furnish material or supplies for a vessel in a foreign port, or in a port other than a port of the State where the vessel belongs, have a maritime lien on the vessel as security for the payment of the price of all such material and supplies. They have such a lien because on the principles of maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel and, consequently, they are entitled to proceed in rem in the Admiralty Court to enforce the lien, but they are not compelled to do so, as they may waive the lien and bring their suit in personam against the master

> or owner, as they are also liable as well as the vessel [citations]".
> (Emphasis supplied)

We submit that the liability for "necessaries" of the owner of the vessel (to pay the amount to discharge the lien) need not be found in a contractual obligation under the common law, as the courts below seemingly held, but arises from the nature of admiralty law independent of the principles of "privity of contract".

This Court in The Kalorama, 10 Wallace 204, 19 L.Ed. 941 (1870) again adhered to the principle of personal liability of the owner of the vessel for the claim for which a maritime lien exists, and said:

> "Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were

> made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances..." (Emphasis supplied)

The District Judge cited The China, (supra) for the proposition that the vessel's owner had no "personal" liability to pay the amount of a maritime lien. Yet a careful reading of The China does not bear out such absolute statement. In that case a vessel, which was under the direction of a compulsory pilot mandated by a statute of the State of New York, caused a collision due to the sole fault of the compulsory pilot. The owner of the vessel claimed that it (or its vessel) were not to be held liable for the damages caused by the accident since they could not be held on the principle of respondeat superior for the neglect of the compulsory

pilot. This Court reviewed the practice in the English courts (at 74 U.S. 61):

> "2. This brings us to the examination of the second proposition. Does the fact that the law compelled the master to take the pilot, exonerate the vessel from liability?
>
> The immunity of the wrong-doing vessel when the pilot is in charge, and alone in fault, is now well settled in English jurisprudence, both in the Admiralty Court and in the courts of common law. The rule must necessarily be the same in both. In such cases the liability of the ship and of the owner are convertible terms. The ship is not liable if the owners are not; and no responsibility can attach to the owners, if the ship is not liable to be proceeded against. The Druid, 1 W. Rob. 399." (Emphasis supplied)

Notwithstanding the philosophical mood of mid-nineteenth century jurisprudence that there be "no liability without fault", this Court refused to import that concept into maritime law, and said (at 74 U.S. 68):

> "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors. The Phoebe, 1 Ware, 273; The Creole, 2 Wall, Jr. 519." (Emphasis supplied).

Thus, The China does not say that the owner of the vessel has no personal liability. It does say that his liability is limited, need not arise out of "personal" acts but is incidental to his ownership, the limitation being his

interest in the vessel. It is on analysis a vicarious liability for the acts of those in operation of the vessel, very much akin to the liability of the owner of a motor vehicle for the negligence of a driver of the automobile operating it with his consent statutorily adapted in almost all American states.

To reconcile maritime liability derived merely from ownership of the vessel with the "fault concept" of liability, text writers and commentators created the fiction of the "legal personality" of the vessel, as if the vessel was a living thing, able to be guilty of fault, and liable for the acts of those in charge of its operation.

We submit that this Court should abandon that fiction and recognize the "in rem liability" of the vessel for what it actually is, namely, stated in

substantive terms:

> "A maritime lien is security for the vicarious liability of the owner of the vessel, derived from his ownership thereof, for the acts of the persons lawfully in charge of operation of the vessel, but limited to the interest of the owner in such vessel".

In Smith v. The Mormacdale, 198 F.2d 849, the Circuit Court of Appeals for the Third Circuit correctly recognized the nature of maritime liability. It said at p. 850:

> "The imposition of liability upon the vessel in situations in which the owner is not personally liable, as in the case of the liability for the negligence of a pilot accepted under the compulsion of state law, is in reality the imposition of absolute liability on the owner, with the liability limited to the value of the ship. See Crowell v. Benson, 285 U.S. 22, 41, note 6, 52 S.Ct. 285, 76 L.Ed. 598, citing Chicago R. I. & P. R. Co. v. Zernecke

1932, 183 U.S. 582, 586,
22 S.Ct. 229, 46 L.Ed. 339;
Holmes, op cit. supra 26-35."

Is the "arrest" of the vessel a conditio sine qua non for that liability? We submit that it is not a constituent element for the owner's obligation to pay the amount for which the "vessel" is liable. If the vessel is "arrested" who ultimately pays the liability of the bond? Clearly, the owner if he wishes to retain the vessel. Is form or procedure to prevail over substance?

There is substantial support in recent decisions for a substantive approach to the "in rem liability" as an obligation of the owner, and for the rejection of the antiquated fiction of the "legal personality" of the vessel.

This Court expressed the modern view of the owner's personal liability for the payment of the lien on his vessel in

The City of Norwich, 118 U.S. 468, at p. 503, in the following significant language:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc.
>
> * * *
>
> but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property.
>
> * * *
>
> In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods

> they are.' Vaughan, C.J., in Sheppard v. Gosnold, Vaughn, 159, 172, approved by Ch. Baron Parker in Mitchell v. Torup, Parker, 227, 236." (Emphasis supplied)

In Consumer Import Co. v. Kabushiki K.K. Zosenjo, 320 U.S. 249, 88 L.Ed 30 (1943), a claimant, whose cargo had been destroyed by fire, sought to charge the vessel for the loss, although the owner was relieved from liability by statutory provision. This Court again rejected the "separation" of the vessel from the owner, and said at p. 253:

> "Congress has said that the owner shall not 'answer for' this loss in question. Claimant says that means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.

> If the owner by statute is told that he need not make good to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them.
> (Emphasis supplied)

The fiction of the "personality of the vessel" came under further criticism by this Court in Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 4 L.Ed. (2d) 1540, 80 S. Ct. 1570, where the Court commented at page 22:

> "The basis of this view that there are two distinct civil actions for §1404(a) purposes is a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment.
>
> The fiction relied upon has not been without its critics

> even in the field it was designed to serve. It has been referred to as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. We are asked here, however, to transplant this ancient salt-water admiralty fiction into the dry-land context of forum non conveniens, where its usefulness and possibilities for good are questionable at best."
>
> (Emphasis supplied)

Similarly, lower federal courts have had no hesitation to view the "in rem liability" of the "vessel" as an obligation of the owner.

In Pichirilo v. Guzman, 290 F.2d 812 (1961), the Circuit Court of Appeals,

First Circuit, said at p. 814:

> "The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the 'personification' of the vessel is not a convenient shorthand method of expressing legal results.
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> * * *
>
> The court rejected this, saying, 'The 'claim' is in either case against the company, though the suit may be against its property.'"

In Henslee v. West Kentucky Coal, 241 F. 609 (6th Cir., 1917), a claimant was allowed to proceed in personam against a person who was but the nominal registered owner, on liabilities incurred by the captain who operated the boat for his own account, after the ship had been lost by

fire.

Cf.: Grigsby v. Coastal Marine Serv. Inc., 412 F.2d 1011 (5th Cir. 1969)

We respectfully submit that the "in rem liability" of the vessel under maritime law is a true obligation of the owner (to the extent of his equity in the vessel) and is not to be viewed upon principles of contract or tort liability of the common law. By the usages of commerce the maritime liability exists beyond customary concepts of liability in contract or tort; it is incidental to the ownership of the vessel. (Cf.: The China, supra).

This limited personal liability as imposed by maritime law on the owner (without his personal involvement, a concept outside of contract or tort principles of the common law) also finds expression in the statutory restatement of

maritime law in the Limitation of Liability Act (46 USC §183) which reads in part:

> "Amount of liability: loss of life or bodily injury; privity imputed to owner; 'seagoing vessel' (a) The liability of the owner of a vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in cases provided in sub-section (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and the freight then pending"
> (Emphasis ours)

Dealing with the almost identical predecessor Limitation of Liability Act of 1851, this Court explained in Providence

and New York Steam Ship Co. v. Hills Manufacturing Co., 109 U.S. 578, at 593, 27 L. Ed. 1038 at 1044 the ancient nature of the rule:

> "The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; ..."

The limitation of liability as so expressed is the other side of the coin of the (personal) obligation of the owner arising out of maritime events without his privity or knowledge. Clearly, on principles of the common law, there would be no liability of the owner where he was not somewhat involved in the facts leading to the claim. Yet, maritime law does impose such liability - arising from the mere ownership of the vessel - but limits it to the owner's interest in the vessel.

We respectfully submit that the courts below failed to conceive that the maritime liability of the owner of a vessel is different from the rules of common law contract or tort law and that the "in rem liability of the vessel" is jurisprudentially the liability of the owner limited to his interest in the vessel.

Learned writers support the concept that the "vessel's" liability is in fact an obligation of the owner. We quote from Hebert, The Origin & Nature of Maritime Liens, 4 Tulane Law Review (1929) at p. 392-393:

> "Regardless of its origin, it is certain that the American courts by accepting the fiction of the 'personality of the ship,' have avoided many difficulties which characterized the development of its English law of maritime liens. It is, of course, the wildest of fictions to say the ship may be considered as a 'personality' or a 'juridical entity.'

> When the Black Book of Admiralty says, 'The ship has to pay for it,' it is impossible to escape the legal results, namely, that the owner's property must be sold to pay for the wrong committed by somebody else. The decisions establishing 'the personality of the ship' simply reflect our commercial policy of imposing liability on a vessel owner regardless of the ordinary rules of agency." (Emphasis ours)

Geoffrey H. Longenecker, a commentator reviewing in 45 Tulane Law Review (1971) (pp. 574-605), the decision in Grigsby v. Coastal Marine Serv. Inc., 412 F.2d 1011 (5th Cir. 1969) - wrote at p. 591:

> "The Fifth Circuit recognized that the ship-owner was relieved of liability in personam in his own right, but nevertheless predicated personal liability on concepts of in rem responsibility:
>
> * * *

> "This position goes well beyond that of the Second Circuit, since the shipowner's personal liability derived from such 'reasoning in rem.' Not only is the vessel personified and deemed at fault, but she binds her owner for her fault, much in the way a negligent child binds his non-negligent father or a negligent employee binds his non-negligent employer. The result appears to be unique in the admiralty."
> (Emphasis supplied)

We submit that we have shown that The China, (supra), lends no support for the holding of the courts below that the petitioner may not assert its maritime claim in an action in personam against the owner where personal jurisdiction has otherwise been obtained.

The other three cases, principally relied on by the District Court, on a true understanding of maritime liability, are quite reconcilable with petitioner's contention.

In Pierside Terminal Operators, Inc. v. M/V Floridian, 389 F. S. 25 (E.D. Va., 1974), a material-man sought recovery from the former owner for supplies to the charterer (where the charter party had contained an express lien prohibition clause) after the 1971 amendment of the statute removed the application of the exclusion clause. The court correctly held that on the basis of contract rules the plaintiff had no claim personally against the former owner. Since the defendant was no longer the owner of the vessel, clearly, he could not be held for the maritime lien created upon the vessel. That case is consistent with appellant's position.

Warner v. The Bear, 130 F. S. 549 (D. Alaska, 1955) again is not an authority for the proposition that a maritime lien does not imply the owner's

obligation to pay the amount of the lien - if *in personam* jurisdiction was obtained. In that case, repairs had been ordered by the agents of the vessel's insurer. The plaintiff sued the owner of the vessel on two different causes of action (a) one sounding in contract based on principles of common law; and (b) maritime *in rem* liability. The court found that the owner had not made the contract with the repairer, and the court thus rejected a common law liability *ex contractu*, but sustained *in rem* liability based upon principles of admiralty law. We submit that this case sustains our proposition that the so-called "*in rem* liability" is a liability based upon principles of admiralty law, independent of, and beyond the rules of common law contract of tort liability.

In *People of the State of California*

v. Italian Motorship Ilice, 534 F.2d 836 (9th Cir., 1976) the court dealt with a collision damage caused by the negligence of a compulsory pilot. Consistent with The China, (supra), the court found no personal liability of the owner of the vessel based on common law tort liability, but held the ship liable in rem. The court did not consider the nature of the in rem liability, nor the "legal personality" fiction of the vessel. We submit that Ilice does not run counter to the right of the petitioner to seek recovery of its maritime claim by an action in personam limited to the owner's equity in the vessel.

The courts below viewed petitioner's contention that it "would make the owner of a vessel absolutely and personally liable for all repairs, services, and

other necessaries ordered by the charterer" (13a). Petitioner did not argue for such absolute and personal liability, but contended that the vessel's owner may be held to the extent of his interest in the vessel in an action in personam, and that the "arrest" of the vessel is not an absolute requirement for the assertion of the maritime claim (lien).

We respectfully submit that the courts below have failed to distinguish between the right (the maritime lien) and the remedy (the arrest of the vessel). Upon such distinction the in rem liability must be seen as a true obligation of the owner of the ship to pay such sums as is created by maritime law as a liability of "the ship", provided it does not exceed the value of the vessel.

Further support for petitioner's position advanced herein is found in

Supplemental Rule C, Subdivision 1, of the Federal Rules of Civil Procedure, the pertinent part of which provides as follows:

"ACTIONS IN REM: SPECIAL PROVISIONS

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime liens;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable." (Emphasis supplied)

Petitioner contended in the courts below, as the District Judge stated (14a) "that Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims permits an action in personam as an alternative to an in rem action". As so expressed, petitioner urges the view that

the procedural remedy of the "arrest of the vessel" is no longer necessary for the assertion of a maritime lien.

The District Court held that petitioner cannot derive any benefit from Rule C for maintaining the in personam action, saying that the rule (16a) "allows in rem and in personam causes of actions to be tried in the same proceeding, where appropriate". We have underlined the words "causes of action" in that quote from the District Judge's opinion to indicate, as we submit, that he again confused the substantive right with the procedural remedy therefor. There is no "cause of action" in rem but there is an action (procedure) in rem, just as an "action in personam" is not indicative of the underlying "cause of action" (substantive right) for which such action is brought. The designation of an action

in rem or in personam is but the description of the facts upon which the court bases its jurisdiction over the thing in litigation or the person of the defendant but is not a rule of substantive law.

Since Supplemental Rule C permits the in rem or in personam procedure in the alternative, we contend that the "arrest of the vessel" is not a requirement for asserting a maritime lien.

We urge this Court to adopt a substantive approach to the assertion of a maritime lien, and to view the "arrest of the vessel" as a proceeding against its owner, as in fact it is. Yet this in rem process, we submit, need no longer be resorted to in order to assert the claim arising out of maritime law.

CONCLUSION

The question here presented involving the fiction of the "personality of the vessel" upon which this Court has not yet clearly spoken is of national importance and magnitude to warrant review by this Court.

Respectfully submitted,

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APPENDIX

JUDGMENT OF CIRCUIT COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of May, one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE WALTER R. MANSFIELD,

HONORABLE JAMES L. OAKES,

Circuit Judges,

DOWELL DIVISION OF THE DOW CHEMICAL COMPANY, Plaintiff-Appellant, v. FRANCONIA SEA TRANSPORT, LTD., Defendant-Appellee.	81-7096

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Sofaer's opinion below.

/s/
IRVING R. KAUFMAN,

/s/
WALTER R. MANSFIELD,

/s/
JAMES L. OAKES, Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

OPINION AND ORDER
OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

DOWELL DIVISION OF THE :
DOW CHEMICAL COMPANY,
:
Plaintiff,
:
-against-
:
FRANCONIA SEA TRANSPORT, LTD.,
:
Defendant.
- - - - - - - - - - - - - - - - - - - -x

OPINION AND ORDER

79 Civ. 0331 (ADS)

#51027

A P P E A R A N C E S :

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ABRAHAM D. SOFAER, D.J.:

Dowell, a division of the Dow Chemical Company, a corporation organized under the laws of Delaware, has brought this action against Franconia Sea Transport, Ltd. ("Franconia"), a Liberian corporation. Franconia owns the vessel M/V George Vergottis, which, at the time the events leading up to this litigation took place, was chartered by the Trefalcon Sales Corporation. Dowell claims that it was requested by the charterer to pump a cargo of oil into the M/V George Vergottis while the vessel was in port in Brownsville, Texas, in mid 1976. The complaint states that Dowell was never compensated for that service, allegedly worth $310,413.60.

Dowell claims that the pumping of the oil into the M/V George Vergottis,

and the associated rental of pumps, created a maritime lien pursuant to 46 U.S.C. §§ 971-975. Under that statute, whenever an authorized person requests "repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel," the person furnishing such service obtains a lien on the vessel that may be enforced by an in rem action. Dowell is unable to pursue an in rem action, because it cannot locate the M/V George Vergottis. Dowell's only claim for recovery, therefore, is based on the assertion that the creation of a maritime lien establishes in personam liability on the part of Franconia. Dowell alleges no other facts upon which recovery could be predicated.

Initially, defendant moved to dismiss the complaint pursuant to Rules 8(c) and

12(c) of the Federal Rules of Civil Procedure, contending that the action was barred by the Texas statute of limitations. After plaintiff filed a cross-motion for summary judgment pursuant to Rule 56, however, defendant also moved for summary judgment. A number of issues are in dispute, including whether, and to what extent, a maritime lien was created; whether this court has jurisdiction of the action and of the defendant; and whether the action is barred by a statute of limitations or laches.

On December 6, 1979, this case was referred to United States Magistrate Ruth Washington pursuant to 28 U.S.C. § 636(b). In a thoughtful and well-researched Report and Recommendation, the Magistrate determined that this Court has both subject matter jurisdiction of this action and personal

jurisdiction of the defendant. In addition, Magistrate Washington decided that a maritime lien did exist, but that it could only be enforced by an *in rem* action and does not in and of itself provide a basis for personal liability. The Magistrate concluded, however, that both motions for summary judgment should be denied because "issues and critical inferences drawn from admitted facts remain in dispute." Each party has filed objections to certain portions of the Report and Recommendation.

Magistrate Washington's findings and recommendations are in general accepted, but not her ultimate conclusion. Even assuming that a maritime lien was created, that the court has subject matter jurisdiction, and that the case is not barred by a statute of limitations

or laches, plaintiff has alleged no basis upon which Franconia would be personally liable. Disputes of fact exist, but not as to any material issue; even if an agreement existed with the charterer this would only establish a maritime lien, not liability of the owner in personam.

Plaintiff contends that a maritime lien not only permits an aggrieved party to pursue an in rem action against the vessel involved, but also creates personal liability on the part of the owner of the ship. Because plaintiff has not alleged any facts by which defendant would be liable on a theory other than the maritime lien, plaintiff's assertion in effect means that owners of vessels are absolutely liable for the amount of any maritime lien

obtained on their ship, however far removed they are from the actual control or management of the vessel.

Maritime law has long established that a maritime lien may impose in rem liability in situations where the owner is not personally liable. See, e.g., The China, 74 U.S. (7 Wall.) 53 (1869). Professor James Wm. Moore has written:

> Although usually one possessing a maritime lien upon a vessel or other res also possesses an in personam cause of action against the owner or other person in possession and control of that res, that need not always be the case. The res may be liable in rem even in instances where there is no concurrent in personam cause of action against its owner or the person or entity in possession.

7A Moore's Federal Practice § C.02 at 609 n.3. In Pierside Terminal Operators, Inc. v. M/V Floridian, 389 F. Supp. 25, 26 (E.D. Va. 1974), the court explicitly

held that the maritime lien statute did not make a ship owner "personally liable for goods or services furnished to the vessel on order of a bare boat charterer of the vessel." See also, Warner v. The Bear, 130 F. Supp. 549 (D. Alaska 1955).

In analogous situations, involving liens other than those created under the maritime lien statute, the courts have taken a similar view. In People of the State of California v. Italian Motorship Ilice, 534 F.2d 836 (9th Cir. 1976), a case resulting from California's attempts to collect from a vessel, its operator, and its owners for damages resulting from a collision, the Ninth Circuit wrote that "[i]t is well settled that the owner of a vessel is not liable, personally, for the negligence of a

compulsory pilot," but nevertheless held that the ship was liable in an action in rem. Id. at 841. See also Grillea v. United States, 229 F.2d 687 (2d Cir. 1956); Empressa Hondurena de Vapores, S.A. v. Bank Line Ltd., 434 F. Supp. 602 (S.D.N.Y. 1977).

Many of the cases cited by plaintiff for the proposition that an aggrieved party has the option of either pursuing an action in rem or in personam involve situations where the shipowner was in some way personally involved in the harm to the plaintiff. For example, in The Kalorama, 77 U.S. (10 Wall.) 204 (1870), the Court held that the fact that the shipowner had ordered some of the repairs made to the ship did not defeat an in rem action based on a maritime lien; and in Grigsby v. Coastal Marine Service,

Inc., 412 F.2d 1011 (5th Cir. 1969), cert. dismissed, 396 U.S. 1033 (1970), the defendant shipowner was found personally liable for damages resulting from the unseaworthiness of its vessel. The Grigsby court made clear, however, that the "absence of possession and control may well insulate the shipowner from liability in personam in the absence of conduct which somehow implicates the remote owner in the deficiency" that causes the damages. Id. at 103.

When a maritime lien attaches, the plaintiff may pursue an in rem action against the vessel involved. The plaintiff also has the option of bringing an in personam action against any party that is directly liable in contract, tort, or some other substantive law, and a shipowner may be such a party.

In the absence of a separate basis of substantive liability, however, the shipowner cannot be held personally liable to the plaintiff merely because a maritime lien has come into existence. As one prominent authority has written:

> Remedies in rem and in personam may co-exist or one may be independent of the other....In such cases, the question before the court is not whether the court has jurisdiction, but whether the party has right: it is...a question of the merits of the action.

2 Benedict on Admiralty (7th ed. 1975) § 25.

A contrary conclusion would make the owner of a vessel absolutely and personally liable for all repairs, services, and other necessaries ordered by a charterer. The maritime lien statute was not intended to cause such a result. Rather, the statute is designed to ensure

that a vessel will be able to obtain needed services and repairs by guaranteeing that suppliers will have a remedy against the vessel if payment is not received. Norton v. The Evan N., 109 F. Supp. 505 (D.R.I. 1952); The City of Helena, 25 F. Supp. 864 (E.D. Mo. 1939).

Plaintiff also contends that Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims permits an action in personam as an alternative to an in rem action. Rule C provides that "[e]xcept as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed against any person who may be liable." But Rule C merely states the general rule that, when a maritime lien attaches, the aggrieved party has the option of

either pursuing an action *in rem* or seeking recovery from any party who is directly liable under some basis of substantive law in an *in personam* action, or both. Rule C does not itself create substantive liability where none would otherwise exist.

According to the Committee that suggested and drafted the Supplemental Rules of Certain Admiralty and Maritime Claims, Rule C was designed to preserve the substance of former Admiralty Rules 13-18. Under those rules, in general, "an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought where the substantive law imposes no liability." Notes of the Advisory Committee on Rules. Even plaintiff concedes that Rule C does not change prior law. Plaintiff's

Supplemental Memorandum of Law at 6. Thus Rule C allows in rem and in personam causes of action to be tried in the same proceeding, where appropriate. But an in personam action may only be brought, to quote the Rule, "against any person who may be liable" under some principle of substantive law.

In short, this Court accepts Magistrate Washington's conclusions that there is jurisdiction of this action and of the defendant, and that some type of maritime lien against the M/V George Vergottis was created. The precise nature of that lien need not be determined, and the other issues underlying the litigation, such as the defenses of laches or of a statute of limitations need not be decided. The lien obtained may not be enforced against this defendant.

so its motion for summary judgment is granted. Fed. R. Civ. P. 56. The Clerk will enter judgment accordingly.

SO ORDERED.

Dated: New York, New York
December 23, 1980.

/s/
ABRAHAM D. SOFAER
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DOWELL DIVISION OF THE DOW CHEMICAL COMPANY,

Plaintiff,

-against-

FRANCONIA SEA TRANSPORT, LTD.,

Defendant.

- - - - - - - - - - - - - - - - - - - x

AMENDED OPINION AND ORDER

79 Civ. 0331 (ADS)

A P P E A R A N C E S:

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ABRAHAM D. SOFAER, D.J.:

The last paragraph of Opinion No. 51027, filed December 24, 1980 in the above matter, beginning with the words "In short" and ending with "Fed. R. Civ. P. 56" should be deleted and the following paragraph substituted in its place:

> In short, this Court accepts Magistrate Washington's conclusion that there is jurisdiction of this action and of the defendant. The other issues underlying the litigation, such as the question of whether a maritime lien was created and the defenses of laches or of a statute of limitations need not be decided. If any lien was obtained, it may not be enforced in this

this action, so the motion for summary judgment is granted. Fed. R. Civ. P. 56.

SO ORDERED.

Dated: New York, New York
January 15, 1981

/s/

ABRAHAM D. SOFAER
United States District Judge

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

DOWELL DIVISION OF THE :
DOW CHEMICAL COMPANY,
:
Plaintiff,
:
-against-
:
FRANCONIA SEA TRANSPORT,LTD.,
:
Defendant.
- - - - - - - - - - - - - - - - - -x

REPORT AND RECOMMENDATION

79 Civ. 0331 (ADS)

TO: THE HONORABLE ABRAHAM D. SOFAER,
U.S.D.J.

The above entitled action was referred by Your Honor to the undersigned to hear and make recommendations as to the disposition of the cross-motions by the parties for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

After oral argument on June 6, 1980,

a review of the file including exhibits and memoranda and a careful check of the appropriate authorities, it is the considered opinion of the undersigned that both motions for summary judgment should be denied. Further, on examination of the critical technicalities and concepts relating to jurisdictional requirements, it is concluded that this court has admiralty jurisdiction[1/] possessing the right to exercise power over the subject matter[2/] of plaintiff's claim.

Further, since there is diversity jurisdiction, maritime law can be applied on the civil side of federal district courts and finally, not only is plaintiff's claim well in excess of $10,000.00, there is a basis for in personam jurisdiction under New York's Long Arm Statute, CPLR §302, through the activity of defendant's chartering agent, in addition

to defendant's stipulation of submission, although defendant maintains it was for a restricted appearance.[3] Therefore, although the court does not have in rem jurisdiction,[4] these other jurisdictional bases, along with subject matter jurisdiction, compel this court to hear and determine this suit on its merits since there are genuine issues as to material facts which preclude the court from granting summary judgment.[5]

FACTS

In this case, the plaintiff, Dowell, a division of Dow Chemical, a Delaware Corporation, instituted an in personam action against Franconia Sea Transport, a Liberian corporation and owner of the vessel M/V George Vergottis which had been chartered by the Trefalcon Sales Corporation. The charter agreement

contained no "prohibition of lien clause". Plaintiff alleges that it was requested by the charter company, Trefalcon Sales Corporation, with consent of the vessel's crew, to have a cargo of oil pumped into the ship M/V George Vergottis in the port of Brownsville, Texas, during July and August, 1976. The complaint states that the reasonable and agreed value of these services was calculated to be $310,413.60.

There is dispute as to whether plaintiff had contracted with a Wallace Brown, or one John Garland, or both, who represented that they had the authority to make the contract on behalf of Trefalcon Sales Corporation or whether the plaintiff's contract had been with Trefalcon Corporation. Dowell insists, however, that their agreement was with the charterer, Trefalcon Sales

Corporation [6] and submits, as one of the exhibits, an invoice addressed to Trefalcon Sales. However, although there appears to be no formal written contract as such, this is a minor point and there remains the more serious question as to whether or not the persons contracting for the rental of the pumps were authorized agents of the charterer.

Neither the charter company, Trefalcon Sales Corporation, nor Trefalcon Corporation alleged as the actual purchaser, paid for the pumping of the oil, although due demand was made. The plaintiff brings this action against the owner of the vessel on the grounds that the rental of the pumps and pumping of the oil was in the nature of stevedoring services and therefore "other necessaries" as defined in Title 46 U.S.C. §971 [7] which entitled it to a maritime

lien against the vessel.[8/]

Initially, defendant moved to dismiss the complaint pursuant to Rules 8(c) and 12(c) of the Federal Rules of Civil Procedure on the basis of the two year Texas statute of limitations, arguing that the action was barred since it was based on a debt which was not evidenced by a contract in writing. However, when plaintiff moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant also moved for summary judgment.

DISCUSSION

Plaintiff asserts that the rental of pumps and loading or pumping of this cargo amobnted to the rendering of stevedoring services which are construed to be "necessaries". Plaintiff properly argues that there is more than ample

authority for holding that stevedoring services are "other necessaries" as defined by Title 46 U.S.C. Section 971 [9/] and create a lien against the vessel. [10/] Plaintiff admits that it did not attempt seizure or arrest of the vessel in the port of Brownsville, Texas, but contends that this suit for the cost of rental of the pumps and pumping the oil, though based on the underlying in rem maritime lien, is properly an in personam action in this jurisdiction, relying on Rule C of Supplemental Rules of Certain Admiralty and Maritime Claims of Federal Rules of Civil Procedure.

The theory that plaintiff may assert its claim for said services against the owner of the vessel without resorting to the admiralty procedures of maritime arrest or seizure is correct but the

plaintiff persists in maintaining that he wishes to enforce a maritime lien.

Plaintiff's argument that the rental of pumps and pumping of oil into defendant's vessel, M/V George Vergottis, was in effect stevedoring services and therefore "other necessaries" is in reliance on the decision of the United States District Court for the Southern District of Texas in an action brought by Clubb Oil Tools, Inc. against the defendant herein, Franconia Sea Transport, Ltd., and others in personam and against the vessel, the M/V George Vergottis, in rem in part to enforce a maritime lien. [11/] The Texas court's decision in the form of Findings of Facts and Conclusions of Law, entered August 10, 1978 and amended October 10, 1978, determined that the pipes rented by Clubb Oil to facilitate the

loading of oil on board the vessel were "other necessaries" within the meaning of Title 46 U.S.C. Section 971. 12/

The plaintiff submits that this court must give the same effect to the adjudication of a federal court in Brownsville, Texas, as a New York court would have to afford a final judgment of a sister state. Hence, plaintiff's position is that the defendant would be precluded from re-litigating the issue as to whether or not the pipe used by the plaintiff in loading the oil on the vessel was "other necessaries" under Title 46 U.S.C. §971 on the basis of collateral estoppel. 13/ Therefore, if the pipes are to be considered in the nature of stevedoring services and "other necessaries", a fortiori, the rental of pumps are "other necessaries" within the purview of Title 46 U.S.C.

Section 971.

It must be pointed out, however, that although plaintiff also used the 'Clubb' pipes, which the Texas court found to be "other necessaries", to pump the cargo of oil, the court did not consider the question of whether the rental of pumps to pump the oil was stevedoring services and hence "other necessaries". It is clear that plaintiff's action is not based on the same factual situation as in Clubb and the issue decided in Clubb is not the issue here so as to call forth the doctrine of collateral estoppel. 14/ Since the issue here is totally different, i.e., the rental of pumps, at best, plaintiff can only argue an extension of the Clubb decision.

This court, on serious reflection, can understand the reasoning in the

Clubb case that the furnishing of oil pipe was reasonably required to facilitate the vessel's mission as the only feasible means of loading the oil was through the use of pipeline; therefore, the creation of a lien to cover the cost of renting the pipe was consistent with the intent of the Federal Maritime Lien Act to keep the ship active. This court finds a problem, however, in stretching that conclusion to cover the rental of pumps and in emcompassing said rental in the definition of "other necessaries" so as to create a maritime lien under §971, Title 46 U.S.C. without further proof by plaintiff.

Despite plaintiff's failure to attach the vessel after it had been arrested by Clubb Oil as well as when the vessel was in Texas waters at other times, plaintiff asserts that although it looked initially

to Trefalcon Sales as the charterer for payment, there was never any intent to release the security of the vessel, prejudice or waive its rights to a maritime lien.

Further, plaintiff strains the concept of admiralty jurisdiction by claiming that, since the underlying basis of this action is a maritime lien and this court has admiralty jurisdiction, Supplemental Rule C permits plaintiff to proceed in personam to enforce the lien. Plaintiff admittedly did not attempt to enforce the lien by the arrest of the vessel, alleging that it was prevented from so doing as the vessel was kept out of Texas waters. Defendant counters by contending that plaintiff was entitled to a maritime lien to secure the debt, plaintiff incorrectly seeks to collect from

defendant by the enforcement of the lien.

The court, as noted earlier, does not view the Clubb decision concerning the rental of pipes as including the rental of pumps so as to find the rental and pumping of oil stevedoring services and therefore "necessaries". However, there is no question that if this court were to find the rental of pumps and the pumping "necessaries" then when plaintiff was not paid, the plaintiff would be entitled to a maritime lien. Hence, if the right to a lien existed, defendant's contention that plaintiff was guilty of laches in failing to arrest the vessel would be valid if plaintiff fails to offer evidence to the contrary. The defendant persuasively maintained that not only did the vessel remain in the port of Brownsville for two weeks after the oil had been pumped into it but she

returned to Brownsville for nineteen days in 1977 and was in United States ports for approximately 3 months between October 1976 and July 1978 and therefore was not kept out of Texas waters as plaintiff claimed. Defendant further insists that this delay was prejudicial.

Although defendant continues to dispute that plaintiff is entitled to a maritime lien, it argues that an action based on a maritime lien can only be brought in rem against a vessel and not in personam against the owner. We would be compelled to disagree on the grounds that an action based on a maritime lien and an action to enforce a maritime lien are two different actions. As long as the claim asserted is maritime in character, then a United States District Court has admiralty jurisdiction which "extends to all contracts, claims and services

which are essentially maritime." 15/

According to 2 Benedict on Admiralty, Section 25, 2-19 (6th ed. 1975):

> If the claim, which is the cause of action, be, by law, a lien upon a vessel, her cargo, freight, the proceeds of the same, or the remnants and surplus thereof, the court may enforce that lien by a suit *in rem*, or, *without reference to the lien, may compel the party himself to pay the demand*. Remedies *in rem* and *in personam* may co-exist or one may be independent of the other, e.g., a right of action in personam may be recognized where no lien is given by the maritime law. (emphasis added)

Nevertheless, defendant's basic contention that enforcement of a maritime lien must be brought *in rem* against the *res* and that there must be a separate independent set of facts as a basis for *in personam* liability in order to proceed alternatively against the owner is correct.

Defendant supports this argument by showing that plaintiff has made no allegations concerning the owner that may give rise to a cause of action and since plaintiff had no contract with the owner of the vessel, plaintiff does not have an *in personam* action against defendant.

Unfortunately, plaintiff repeatedly asserts that this *in personam* action to enforce his lien is permitted by Supplemental Rule C, hence, defendant correctly maintains that the enforcement of the lien would have to be *in rem* against the vessel. Since the vessel is not within our territorial waters or the geographical limitations of this district, there is no power over the *res* [16/] although we maintain that since the underlying character of the suit is maritime, this court has admiralty jurisdiction.

The substantive concept then of proceeding against the vessel to enforce the lien, defeats plaintiff's theory that Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, permits him an alternative remedy to an action in rem against the vessel by allowing a suit in personam.

Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims (the Admiralty Rules) provides:

> (1) When Available. An action in rem may be brought:
> (a) To enforce any maritime lien
> (b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.
>
> Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

The Advisory Committee's notes to Supplemental Rule C would indicate that the Committee considered that the former Admiralty Rules 13 through 18 were not only procedural but also essentially substantive rules of law and they merged them into Supplemental Rule C. The notes further reveal that the wording in subdivision 1 of Supplemental Rule C was designed to preserve the proceeding in rem as it exists in admiralty cases and at the same time keep the substance of the former Admiralty Rules 13 through 18. The reference to any maritime lien was intended to include liens created by state law which are enforceable in admiralty.

Although defendant properly noted that unless there is a separate and independent basis for in personam liability, Supplemental Rule C cannot help the

plaintiff, defendant mistakenly concludes that this court lacks subject matter jurisdiction. While the court does have admiralty jurisdiction, without the physical (actual or constructive) custody of the property, this court cannot enforce plaintiff's lien which can only be accomplished through an in rem proceeding. Hence, the entitlement to a lien is of no value to plaintiff if he persists in confusing the legal principles requisite to the enforcement of a lien and the payment of a debt.

RECOMMENDATION

The foregoing discussion of the pleadings and supporting memoranda, as examined and analyzed in the framework of relevant authorities and legal precedents, established that many substantial issues and critical inferences drawn from admitted facts remain in dispute, there-

fore both motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure should be denied.

Determining that the basic nature of this action is maritime, it is concluded that this court has admiralty jurisdiction[17/] and although the pivotal question as to whether or not plaintiff, as he alleges, is entitled to a maritime lien is not resolved here, it is clear that Supplemental Rule C, which providing both procedural and substantive remedies, does not give an action in personam when the applicable substantive law imposes no personal liability.

Pursuant to 28 U.S.C., Section 636, as amended, the parties shall have ten (10) days within which to lodge written objections to the foregoing report with the Honorable Abraham D. Sofaer. Such objections should be filed with the

Clerk of the Court with extra copies delivered to the chambers of Judge Sofaer, Room 3006 and the chambers of the undersigned, Room 121.

Dated: New York, New York
September 4, 1980

Respectfully submitted,

RUTH V. WASHINGTON
UNITED STATES MAGISTRATE

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FOOTNOTES

1/ The test of admiralty jurisdiction under the Act of 1789, is the nature of the claim on which the suit is founded and not the form of remedy resorted to, and when the claim is maritime, it comes within that jurisdiction exclusively excepting only the right of suitors to pursue common-law remedies, or what is equivalent thereto, in other courts, The Petrel v. Dumont, 28 Ohio St. 602,

2 Am.Rep. 397 (1876); The Hine v. Trevor, 71 U.S. 555, 4 Wall 555 (1967); Gowmas v. K. Karras & Son, 140 F.2d 157 (2d Cir. 1944) cert. denied, 322 U.S. 734 (1944); Berwind - White Coal Mining Co. v. City of New York, 135 F.2d 443 (2d Cir. 1943). Whether a district court, sitting as a court of admiralty, has the power to hear and determine a given question may well depend on how that question is presented in the case. Putnam v. Lower, 236 F.2d 561 (9th Cir. 1956).

2/ Jurisdiction of the subject matter which is the power and authority of the court to act, is not equivalent in meaning to venue, which is the place where the power to adjudicate is to be exercised and the place where a suit may be or should be heard. Farmers Elevator Mutual Insurance Co. v. Carl J. Austad & Sons, Inc., 343 F.2d 7 (8th Cir. 1965), Brown v. Pyle, 310 F.2d 95 (5th Cir. 1962). Jurisdiction has been defined in one sense as the power to hear and determine the subject matter in controversy in the suit before the court and in another sense to determine whether such power is conferred upon the court in the circumstances disclosed.

3/ Any admiralty action may be brought against a corporation in any United States District Court which can obtain personal jurisdiction over that corporation. In re Louisville Underwriters, 134 U.S. 488 (1890): Bartlett-Collins Co. v. Surinam Naviga-

tion Co., 381 F.2d 546, 548 (10th Cir. 1967): Ocean Science and Engineering Inc. v. International Geomarine Corporation, 312 F.Supp. 825, 829 (D.Del. 1970).

4/ Power or control which a court has over a thing or object itself (the res) which in this instance is the vessel, M/V Goerge Vergottis, so that its judgment is valid as against the rights of every person in the thing.

5/ Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). See also FILI Moretti Cereali v. Continental Grain Co., 563 F.2d 563, 566 (2d Cir. 1977).

6/ By the provisions of 46 U.S.C. §§ 972, 973, the charterer is authorized to create liens on the chartered vessel for "other necessaries" furnished it, since the charterer is a "person to whom the management of the vessel at the port of supply is intrusted". See, e.g., The J.W. Hennessy, 57 F.2d 77, 79 (2d Cir. 1932); The Golden Gate, 52 F.2d 397, 399 (9th Cir. 1931).

7/ Title 46 U.S.C. Section 971 provides:

> Persons entitled to lien.
> Any persons furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries to any vessel, whether foreign or domestic, upon the order of such vessel, or of a person authorized by the owner, shall have a maritime lien on the

vessel, which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

8/ Nacirema Operating Co., Inc. v. S.S. Al Kulsun, 407 F.Supp. 1222, S.D.N.Y. 1975); International Terminal Operating Co. v. S.S. Valmas, 375 F.Supp. 586 (4th Cir. 1967); In re North Atlantic and Gulf Steamship Co., 204 F.Supp. 899 (S.D.N.Y. 1962), aff'd on other grounds, sub nom Schilling v. A/S D/S Dannebrog, 320 F.2d 628 (2d Cir. 1963).

9/ Supra n. 7

10/ Supra n. 7.

11/ Clubb Oil Tools, Inc. v. M/V George Vergottis, 460 F.Supp. 835 (S.D.Tex. 1978).

12/ Id. at 836.

13/ The doctrine of 'Mutuality of estoppel' need not be considered here since the essential elements of collateral estoppel have not been established.

14/ When a court has made no specific findings of fact or conclusions of law on an issue, a party cannot be precluded by the application of collateral estoppel from litigating that issue. See, e.g., Fink v. Coates, 323 F.Supp. 988, 990 (S.D.N.Y. 1971).

15/ Ex parte Easton, 95 U.S. 68, 72 (1877).

16/ See Vazman, S.A. v. Fidelity International Bank, 418 F.Supp. 1084 (S.D.N.Y. 1976).

17/ In determining if a given case is within the jurisdiction of an admiralty court, guidance is to be found by looking to traditional admiralty jurisdiction. "[A]n absence of the precise question having been previously presented to an admiralty court heretofore is not fatal to assuming jurisdiction if it exists. New situations arise from time to time which may call for a consideration of the jurisdiction of admiralty". Sound Marine & Machine Corporation v. Westchester County, 100 F.2d 360, 362 (2d Cir. 1938), cert. denied, 306 U.S. 642 (1939).

Opposition

81-375

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

DOWELL DIVISION OF THE DOW CHEMICAL COMPANY,

Petitioner,

vs.

FRANCONIA SEA TRANSPORT, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Can a maritime lien be enforced only against the vessel in an *in rem* action?

2. Does the existence of a maritime lien establish *in personam* liability of the shipowner if there is no separate and independent basis for liability?

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In The

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FRANCONIA SEA TRANSPORT, LTD.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Respondent Franconia Sea Transport, Ltd. respectfully prays that the petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the

Second Circuit dated May 15, 1981 be denied.

CITATIONS TO THE OPINIONS BELOW

The Circuit Court of Appeals rendered no opinion. The opinion of the District Court is reported at 504 F.Supp. 579 (S.D.N.Y. 1980)

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit dated May 15, 1981 which affirmed a judgment of the United States District Court for the Southern District of New York granting Respondent summary judgment. The judgment was entered pursuant to an opinion and order dated December 23, 1980, by the Honorable Abraham D. Sofaer, United States District Judge. The opinion was amended by order dated January 15, 1981, issued by Judge Sofaer.

Petitioner, as plaintiff, brought this action against Respondent, as defendant, to recover the sum of $310,413.60 for the rental of pumps used to pump cargo into the M/V GEORGE VERGOTTIS, owned by Respondent. Neither Respondent nor anyone acting on its behalf rented the pumps. Petitioner contended that it acquired a maritime lien and it sought to enforce it against Respondent in personam. No independent basis of substantive liability on the part of Respondent was alleged. The vessel was not named a defendant and no in rem action had been brought against the vessel.

Both parties moved for summary judgment and Judge Sofaer referred the motions to the Honorable Ruth V. Washington, United States Magistrate, to hear and make recommendations.

The Magistrate rendered her

Report and Recommendations on September 4, 1980, (A 21a to A 45a), rejecting the precise contentions advanced by Petitioner herein. Finding it unnecessary to determine whether a lien against the vessel was created, the Magistrate held that such a lien could only be enforced against the vessel in an *in rem* action, and not in an *in personam* action against the shipowner. Magistrate Washington held that the existence of a maritime lien alone is not sufficient to hold the shipowner personally liable but that personal liability by the shipowner must be based on a separate and independent set of facts. In addition the Magistrate held that Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims did not change prior substantive law that a maritime lien be enforced only against the *res* in an *in rem* action.

Judge Sofaer adopted the Magistrate's recommendations and dismissed the complaint in view of Petitioners admitted failure to allege any basis of liability by Respondent, (A 3a to A 20a). He concluded that in the absence of a separate basis of substantive liability a shipowner cannot be held personally liable merely because a maritime lien has come into existence.

The Court of Appeals affirmed on Judge Sofaer's opinion, (A 1a to A 2a).

Respondent takes exception to Petitioner's description of the District Court's opinion as being on procedural grounds. Moreover it was not the failure to arrest the vessel which resulted in dismissal of the complaint as stated in Petitioner's "Statement of Case".

SUMMARY OF ARGUMENT

1. Petitioner seeks to reverse more then a century of well established maritime law without advancing policy, business or legal reasons for such a radical change.

2. A maritime lien can only be enforced against the vessel in an action *in rem* and the existence of a maritime lien does not establish liability against the shipowner unless there is a separate and independent basis for such liability.

3. Rule C did not change prior substantive maritime law that a maritime lien can only be enforced against the vessel in an *in rem* action.

ARGUMENT

It is well established that a maritime lien can only be enforced against the vessel in an action *in rem* and that the existence of a maritime lien

does not establish personal liability of the shipowner unless there is a separate and independent basis for such liability.

Petitioner argues that the concept of in rem and in personam liability present in this case needs clarification, that there is no clear statement thereon by this Court and that there is a need to settle the allegedly still open questions of law. In truth Petitioner is seeking a reversal of well established and settled principles of admiralty law which are based on sound jurisprudential grounds.

Petitioner's basic contention, rejected both by the District Court and the Court of Appeal, is that it may enforce a maritime lien it allegedly acquired, in an in personam action against Respondent, the owner of the vessel without establishing an independent

liability by Respondent. Petitioner's theory is misconceived and contrary to long standing principles of maritime law. It is settled law that a maritime lien may exist without personal liability of the owner of the vessel. See, e.g., The China, 74 U.S. (7 Wall.) 53 (1869); People v. Italian Motorship Ilice, 534 F.2d 836 (9th Cir. 1976); Pierside Terminal Operators, Inc. v. M/V FLORIDIAN, 389 F.Supp. 25, 26 (E.D. Va. 1974); Warner v. The Bear, 130 F. Supp. 549 (D. Alaska 1955); 7A Moore' Federal Practice ¶C.02; Rogers, Enforce of Maritime Lines and Mortgages, 47 Tul. L.Rev. 562 (1973).

Professor James Wm. Moore has written:

> Although usually one possessing a maritime lien upon a vessel or other res also possess an in personam cause of action against the owner or other person in possession and control of

> that res, that need not always be the case. The res may be liable in rem even in instances where there is no concurrent in personam cause of action against its owner or the person or entity in possession. 7A Moore's Federal Practice ¶C.02, at 609 n.3.

A maritime lien is enforceable only against the res, which must be seized in order for the court to have in rem jurisdiction. See, e.g., The Trenton, 4 F. 657 (E.D. Mich. 1880); 7A Moore's Federal Practice, supra; Rogers, Enforcement of Maritime Liens and Mortgages, supra. Again Professor Moore sets forth the law:

> A proceeding in rem is not against a named individual or corporate entity; it is against the res itself. Moreover, such action can only be commenced by one possessing a maritime lien or the statutorily provided equivalent thereof which can be executed against the particular res desginated in the Complaint as the defendant. Only throught such an in rem proceeding can maritime liens be executed and the res

> transferred to purchasers or creditors free and clear of the claims of maritime lienors. 7A Moore's Federal Practice, ¶C.02 at 609-10.

Similarly, Rogers, Enforcement of Maritime Liens and Mortgages, supra, states:

> Execution of a maritime lien may be accomplished only under the federal court's admiralty and maritime jurisdiction, and only through a proceeding in rem, i.e., against the property itself as defendant. The in rem proceeding depends, in turn, on the court's acquiring physical custody of the property (the res). (Emphasis original)
>
> * * *
>
> Therefore, the guiding legal principles underlying the successful enforcement of a maritime lien are not so obvious as to render repetition superfluous;
>
> * * *
>
> 3. Seize the res. Neither stipulation of in rem jurisdiction, nor appearance by the owner in personam, nor filing of a claim of owner, nor even the fact that the court may permit proceedings

> to continue to judgment on the merits, can create, or substitute for, the essential ingredients for in rem jurisdiction and in rem proceeding, i.e., judicial seizure and custody of the property proceeding against. (Emphasized supplied).

The shipowner may be held personally liable only if there exists an independent basis of liability. The existence of a maritime lien alone will not render the owner personally liable. See, e.g. Pierside Terminal Operators Inc. v. M/V FLORIDIAN, supra; Warner v. The Bear, supra.

Warner v. The Bear, supra, is peculiarly applicable herein. Warner held that where there is no agreement that the owner would be personally bound and no expectation or understanding on the part of the supplier that the owner would pay, the supplier would be precluded from recovering from the owner on a contract theory or a

theory of quasi-contract. The vessel in question, however, was held subject to a maritime lien where the owner knew or authorized that the repairs would be made.

In Pierside Terminal Operators, Inc. v. M/V FLORIDIAN, supra:

> It has long been the maritime law that the owners of a vessel are not personally liable for goods or services furnished to the vessel on order of a bare boat charter of the vessel. The U.S. 219, 21 F.Supp. 463 (E.D. Pa. 1937); The Lizzie Burt, 16 F.Supp. 67 (D. Del. 1936).
>
> It is movants contention that the 1971 amendment to 46 U.S.C. § 973 changed the previously stated rule of law and made the owner liable, in personam, for the obligations of the charterer. We find no support for such a contention in either the statute or the congressional history of the statute.
>
> 46 U.S.C. §§ 971-973 are concerned with the statutory creation and regulation of maritime liens. A maritime lien is defined 'as a right of property in a ship adhering

to it wherever it may go, vesting a right in the person whose claim is thereby secured to cause a sale of the ship in a proceeding directly against it in order to obtain satisfaction of his debt.' The Ruper City, 213 F. 263, 267 (W.D. Wash. 1914). The maritime lien is a lien on a vessel and only indirectly, inasmuch as it conflicts with the owner's rights in the vessel, is it connected with the owner.

> The maritime lien is a proprietary interest or right in the steamer itself, and not a cause of action or demand for a personal judgment against its owner. The Theodore Roosevelt, 291 F. 453, 416 (N.D. Ohio 1923), pet. dismissed 10 F.2d 15, 6th Cir., cert. den. 271 U.S. 674, 46 S.Ct. 488, 70 L.Ed. 1145.

The 1971 amendment of 46 U.S. C. § 973 was intended to alter only the requirements for establishing a maritime lien; it neither enlarges nor diminishes an owner's in personam liability which is a separate and distinct matter from the in rem liability of the vessel.

The District Court herein summarized the law as follows:

"When a maritime lien at-

> taches, the plaintiff may pursue an in rem action against the vessel involved. The plaintiff also has the option of bringing an in personam action against any party that is directly liable in contract, tort, or some other substantive law, and a shipwoner may be such a party. In the absence of a separate basis of substantive liability, however, the shipowner cannot be held personally liable to the plaintiff merely because a maritime lien has come into existence. As one prominent authority has written:
>
> > Remedies in rem and in personam may co-exist or one may be independent of the other. . . . In such cases, the question before the court is not whether the court has jurisdiction, but whether the party has right: it is. . . a question of the merits of the action. 2 Benedict on Admiralty (7th ed. 1975) §25, 504 F.Supp. 581"

Petitioner fails to cite a single case where a maritime lien has been enforced against the shipowner personally. Indeed, Petitioner's argument is based on a few quotations extracted from cases out of context and without

stating the facts or the holding of the case. None of the language qouted has any applicability to the facts herein. Reduced to its essence, Petitioner's argument is a naked plea addressed to the Court to reverse more than a century of maritime law. No policy or business reasons are advanced in support of the radical departure from the law urged by Petitioner because none exists. Besides turning maritime law on its head, the only end that would be served by such a reversal is Petitioner convenience. There is no conflict nor need for clarification. The issue is well settled and founded on sound principles.

Petitioner relies herein on the same cases which it cited to the courts below. The District Court observed:

> Many of the cases cited by plaintiff for the proposition that an aggrieved party has the option of either pursuing an action in rem or in personam

> involve situtations where the shipowner was in some way personally involved in the harm to the plaintiff. For example, in The Kalorama, 77 U.S. (10 Wall.) 204, 19 L.Ed. 941 (1870), the Court held that the fact that the shipowner had ordered some of the repairs made to the ship did not defeat an in rem action based on a maritime lien; and in Grigsby v. Coastal Marine Service, Inc., 412 F.2d 1011, 1033, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970), the defendant shipowner was found personally liable for damages resulting from the unseaworthiness of its vessel. The Grigsby court made clear, however, that the 'absence of possession and control may well insulate the shipowner from liability in personam in the absence of the conduct which somehow implicates the remote owner in the deficiency' that causes the damages. 504 F.Supp. 581.

The remaining cases cited by Petitioner are equally inapposite. The Belfast, 74 U.S. (7 Wall.) 624 (1868), was an affirmance that exclusive jurisdiction to enforce a maritime lien lies with the Federal District Courts. The court held that plaintiff could proceed

against the res to enforce his lien in federal court or in personam at common law in state court against the party violating the contract, pursuant to the saving to suitors clause of Judiciary Act of 1789.

The China, supra, cited by Peititioner and upon which the courts below relied enforced a maritime lien against the vessel but did not hold the shipowner personally liable.

The City of Norwich, 118 U.S. 468 (1886) is particularly inapplicable. The case involved limitation of liability proceedings arising out of a collision. The language quoted by Petitioner refers to the court's holding that the owner is entitled to a limitation of liability to the value of his interest in the hsip.

Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zo Senja 320 U.S. 249

(1943), held that the Fire Statute extinguishes claims against the vessel as well as claims against the owner.

Continental Grain Co. v. Barge FBL.-585, 364 U.S. 19 (1960) is foreign to the issue of whether a maritime lien may be enforced personally against a shipowner.

In Pichirillo v. Guzman, 290 F.2d 812 (1st Cir. 1961), the court held that a maritime lien did not arise for a claim on which no jural person is liable "in personam." (Compare Grillea v. United States, 232 F.2d 919 2d Cir. 1956).. which holds otherwise). That does not answer the question, whether a maritime lien may be enforced, as Petitioner proposes, not against the res, but personally against the owner.

Henslee v. West Kentucky Coal Co., 241 F.609 (6th Cir. 1917) held the owner liable for supplies ordered by

the master where the owner had represented that the master was acting under his authority. This is not contrary to the District Courts decision.

The cases cited do not truly raise any serious issues with established maritime law nor demonstrate any need to reconsider such law. The holding that a maritime lien can only be enforced against the vessel in rem and that a maritime lien creates no personal liability absent additional factors is is well establish and no need or reason to change the law has been established by Petitioner.

Petitioner also argues that somehow Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims changes the long established rule that a maritime lien may be enforced only against the res in an in rem action.

Petitioner contends that Rule C creates an action against the owner by making him liable in personam for maritime liens even if no other basis for liability exists.

The language in Rule C does not change the law. It does nothing more than make it clear that the new rules do not prohibit the joining of in personam and in rem claims. Professor Moore leaves no doubt when he states:

> [I]f a cause of action alleges loss or injury arising out of the breach of a maritime contract, or the occurrence of a maritime tort, and is cognizable within the admiralty jurisdiction of the district courts it is most likely-although clearly not inevitable-that the possessor of the cause of action will also possess a maritime lien. And, while the person or entity possessing such a potential maritime cause of action can usually proceed in personam in the admiralty against the person or entity responsible for the alleged worng or loss, he can also or in addition choose to execute

> upon that lien by commencing an action in rem against the vessel, cargo, freight, or other maritime res responsible for the alleged loss. Such an action to enforce, or execute, the maritime lien is a maritime action in rem and is solely against the res itself and not against those persons or entities who own, possess or control the res against which the lienor seeks to enforce his claim. (footnotes omitted.) 7A Moore's Federal Practice ¶C.03, at p. 611.

Professor Moore explains:

> The long-standing admiralty practice of permitting a claimant to proceed both in rem and in personam to recover damages for a cause of action giving rise to in personam and in rem rights has been incorporated as part of the admiralty procedure. See Supplemental Rule C(1), where it is expressly provided that "Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable." 7A Moore's Federal Practice, ¶C.03, at p. 611, n.4.

The fact that Rule C does nothing more than preserve the prior law and

the joinder of an in personam cause of action with an in rem cause of action to enforce a maritime lien is confirmed by the notes of the Advisory Committee. They state:

> The main concern of Admiralty Rules 13-18 [the predecessor of Subdivision (1) of Rule C] was with the question whether certain actions might be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability.
>
> (Emphasis supplied)

Therefore it is clear that Petitioner's Rule C argument lacks merit and establishes no reason to change the long established and settled law governing the enforcement of maritime liens.

CONCLUSION

THE PETITION SHOULD BE DENIED FOR THE REASONS HERETOFORE STATED.

Respectfully submitted

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